When a Lower Court has refused bail then I agree that the High Court should not interfere with the discretion of the Lower Court unless there are good reasons for so doing and as the High Court has not heard the case such reasons must be set out in the affidavit in support of the application for bail. There may be cases in which a Magistrate has made an error in law that is obvious on the face of the record and there may also be cases where it is plain that a Magistrate has seriously misinterpreted the facts. Circumstances such as these might be reasons if properly set out in the affidavit which would induce the High Court to grant bail where the Lower Court has refused it.

It seems to me, however, that the granting of bail pending appeal by the Lower Court being a matter of discretion a Magistrate may, apart from the accused's statement that he intends to appeal, find in the circumstances of the case before him reasons which would justify the granting of bail. The considerations which I suggest should guide the Subordinate Courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed are the gravity or otherwise of the offence; the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard; whether there are difficult points of law involved; whether the accused is a first offender or has previous convictions; the possibility of his becoming again involved in similar or other offences whilst at liberty; and whether the security imposed will ensure the attendance of the appellant before the appellate Court.

I found myself in substantial agreement, in so far as applications to the High Court are concerned, with the views expressed by Wilson J. set out above and as the facts of the case before me are very similar I preferred to follow his decision rather than those of Fisher J. The application was, therefore, dismissed.

Application dismissed.

Solicitors for the applicants: *Hogan, Adams & Allan.*

REGINA v. R. W. DOWNEY.

[A. Cr. J. (Spenser Wilkinson, J.) May 21, 1954]

[Penang — Criminal Appeal No. 15 of 1954]

Penal Code, s. 304A — Causing death by a rash act — Sentence.

This was an appeal by the Public Prosecutor against the sentence imposed by the learned Magistrate on a charge under s. 304A of the Penal Code. The respondent had pleaded guilty to the charge and was fined $1,500 or 3 months rigorous imprisonment in default.

Held: (1) once the degree of rashness or negligence required to sustain the charge under s. 304A of the Penal Code has been proved, there cannot be many cases in which a sentence of a fine would be an adequate punishment; (2) in the present case the sentence of fine was inadequate and should therefore be altered to one of 5 months rigorous imprisonment.

Cases referred to:—

(1) *Public Prosecutor v. Sayer* (1947) M.U.L.R. 129; (1947) M.L.J. 142.

(2) *Cheon Keok v. Public Prosecutor* (1940) M.L.J. 103.

(3) *Public Prosecutor v. Mohamed Salleh bin Hitam* (1940) M.L.J. 187.

(4) *Andrews v. Director of Public Prosecutions* (1937) A.C. 576.

(5) *Rex v. Bateman* 19 Cr. App. R. 8.

CRIMINAL APPEAL.

J. D. Peterkin (Federal Counsel) for the appellant.

Respondent in person.

Spenser Wilkinson, J.: — This was an appeal by the Crown against the sentences imposed upon the respondent in respect of a charge under section 304A of the Penal Code and a charge of failing to stop after an accident under section 12(1) of the Motor Vehicles (Driving Offences) Proclamation.

The facts were that the respondent was seen in company with another soldier taking and driving away without Military permission a Military 1-ton lorry of which he was not normally the driver. Whilst driving along a straight piece of road near the 6th milestone on the main North-South road in Province Wellesley at a very fast speed the vehicle driven by the respondent collided with a Malay who was pushing a bicycle on the same side of the road in the same direction with two children aged 11 and 6 respectively on the bicycle. As a result of the collision the Malay who had been wheeling the bicycle and one of the children were thrown approximately 30 feet and killed instantaneously. The vehicle failed to slow down or stop. It was next seen at 6.30 p.m. at Machang Buboh where it had broken down and the accused was taken into Military custody. The left mudguard and the left front lamp were heavily damaged and bloodstained. The respondent admitted partaking of alcoholic refreshment prior to the accident.

Originally two charges were framed under section 304A of the Penal Code in respect of the death of each of the deceased. The learned Magistrate, however, quite properly amended these charges and framed one charge under section 304A of the Penal Code in respect of both deaths. This is in accordance with the decision in the case of *Public Prosecutor v. Sayer*[1].

The learned Magistrate also framed a second charge under section 12(1) of the Motor Vehicles (Driving Offences) Proclamation of failing to stop after an accident. The respondent pleaded guilty to both charges. He was, therefore, convicted and on the first charge was fined $1,500 or three months' imprisonment in default, and on the second charge was fined $200 or one month's imprisonment in default.

The learned Deputy Public Prosecutor submitted that in a case such as this the accused should not have been given the option of a fine but that a sentence of imprisonment should have been imposed.

In his grounds of decision the learned Magistrate said :—

"However the only proper object of any fine or imprisonment in a case of this nature is to provide a deterrent to others and the sentence should not aim at retribution. I considered, moreover, that the sentence imposed should be related to the accused's act in driving in a dangerous manner rather than to the tragic, but largely fortuitous consequence that two persons had been killed. I observed that the maximum penalty provided for a first offence of dangerous driving under the Motor Vehicles (Driving Offences) Proclamation is a fine not exceeding five hundred dollars or imprisonment for a term not exceeding six months. The accused, being a soldier in the British Army, was not highly paid. It was his first offence."

The learned Magistrate appears to me to have erred on a matter of principle. There is no analogy between the offence of dangerous driving and an offence under section 304A. Causing death by a rash act is a form of homicide and is roughly the equivalent of the English offence of manslaughter by negligence. It is the causing of death which is the main ingredient in the offence. A person may be guilty of dangerous driving, although he has caused no damage to anyone.

In considering what sentence should be imposed I found some difficulty at first sight in distinguishing the present case from that of *Public Prosecutor v. Sayer*[1] quoted above in which a sentence of 16 months' imprisonment was imposed. In *Sayer's case*[1], however, the vehicle driven was a very big Military lorry and the rashness consisted in driving this vehicle at a high speed in one of the most congested streets of Kuala Lumpur at a very busy time. In the present case the respondent was driving a smaller vehicle and was driving along a stretch of straight road where speed in itself does not necessarily constitute rashness or negligence. The rashness in this instance consisted in driving the vehicle so fast and in such a manner as to be unable to avoid an innocent citizen walking quietly with his bicycle on the side of the road at a time when there was no other traffic to make it necessary to drive anywhere near him.

I do not think it was really necessary for the learned Magistrate to add the additional charge because on a charge of causing death by a rash act I am of opinion that the failure to slow down or stop was admissible evidence on the main charge to indicate the general state of mind of the respondent.

It has been held by the Court of Appeal in two consecutive decisions (*Cheow Keok v. Public Prosecutor*[2]; *Public Prosecutor v. Mohamed Salleh bin Hitam*[3]), that the same high degree of negligence is necessary to support a conviction under section 304A as is required to support a conviction for manslaughter by negligence in England. In *Andrews v. Director of Public Prosecutions*[4] the test laid down in *Rex v. Bateman*[5] was approved to the effect that in an indictment for manslaughter the negligence of the accused must go beyond a mere matter of compensation between subjects and show such a disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment. I am of opinion that this degree of rashness was clearly shown in this case.

Whilst I am far from laying down that a sentence of imprisonment must always be imposed in these cases it seems clear that once the degree of rashness or negligence above described has been proved there cannot be many cases in which a sentence of a fine would be an adequate punishment. Bearing this in mind and taking into consideration all the circumstances in the present case I quashed the sentence imposed by the learned Magistrate and substituted a sentence of five months' imprisonment on the first charge and a fine of $1 on the second charge.

Order accordingly.

LOKE SOO HAR v. PUBLIC PROSECUTOR.

[C. A. (Matthew C.J., Wilson and Abbott JJ.)
May 24, 1954]

[K. L. — Criminal Appeal No. 23 of 1954]

Criminal trial — Identification — Use of photographs of known pickpockets to identify accused — Suggestion that accused is a person of bad character.

In this case at the trial evidence was given that in the course of Police investigation a number of photographs were shown to a witness and that the witness identified the accused from them. In the course of the evidence the Police Inspector used the following words "I showed him 4 or 5 photographs. They were photographs of known pickpockets living in the area".

Held: (1) the evidence of the Police Inspector coupled with the evidence of identification must have left the jury with the impression that the appellant was a known pick-pocket and a person of bad character and therefore such evidence should not have been admitted: (2) as the evidence of identification played an important part in the case the Court was unable to say that had such evidence been excluded, the jury must inevitably have arrived at the same verdict and therefore the conviction must be quashed.